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Twombly is the Logical Extension of the *Mathews v. Eldridge* Test to Discovery

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TWOMBLY IS THE LOGICAL EXTENSION OF THE *MATHEWS V. ELDRIDGE* TEST TO DISCOVERY

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Abstract

The Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly* has baffled and mystified both practitioners and scholars, casting aside the well-settled rule for evaluating motions to dismiss in favor of an amorphous "plausibility" standard. This Article argues that *Twombly* was not revolutionary, but simply part of the Court's ever-expanding application of the familiar three-factor *Mathews v. Eldridge* test, used to determine whether procedural due process requires adopting a procedural safeguard. *Twombly* recognized that misused discovery can deprive litigants of property and liberty interests, and, thus, consistent with *Mathews*, requires a safeguard—dismissing the complaint. Based on this conclusion, this Article explains *Twombly*'s origins and structure, and suggests a source from which lower courts may draw in developing post-*Twombly* jurisprudence.

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I. INTRODUCTION

In 2007, the Supreme Court in *Bell Atlantic Corp. v. Twombly*[1] shocked lower courts and litigators when it expressly rejected the rule

1. 550 U.S. 544 (2007).

for notice pleading that had been well-settled for half of a century.[2] In *Twombly*, a seven-Justice majority disavowed the oft-cited statement from *Conley v. Gibson*[3] that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[4] The *Twombly* court explained that "this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard."[5]

The *Twombly* decision has thrown lower courts into confusion,[6] making it unclear how to evaluate motions to dismiss under the Federal Rules of Civil Procedure and their state analogs.[7] Motions to dismiss for failure to state a claim are one of the fundamental mechanisms by which courts handle litigation and determine the scope of addressable legal wrongs. The broad impact of *Twombly* is evidenced by how often courts have cited to it—more than 18,000 cases have already cited it at the time of this writing, less than two years after it was decided.[8] Justice Stevens' dissent in *Twombly* was almost certainly correct in stating that the majority's opinion would "rewrite the Nation's civil procedure textbooks."[9]

In place of *Conley*'s "no set of facts" rule, the *Twombly* Court adopted a new "plausibility standard."[10] But the word "plausible" is ambiguous. In neither *Twombly* itself nor the subsequent case of *Ashcroft v. Iqbal* has the Court given guidance on either the meaning of

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2. *Id.* at 562–63.

3. 355 U.S. 41 (1957).

4. *Id.* at 45–46 (emphasis added).

5. *Twombly*, 550 U.S. at 563.

6. Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007) ("Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*.") (internal citation omitted). A judge on the U.S. District Court for the Southern District of New York has noted that *Twombly*, despite being extremely heavily cited, has created great uncertainty for district court judges. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 SUFFOLK U. L. REV. 851, 852 (2008) ("Because *Twombly* is so widely cited, it is particularly unfortunate that no one quite understands what the case holds.").

7. *Twombly*, 550 U.S. at 578 (Stevens, J., dissenting) ("[T]wenty-six States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates . . . ."); *see also* Z.W. Julius Chen, Note, *Following The Leader:* Twombly, *Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431 (2008) (discussing whether these states should also adopt the new *Twombly* standard).

8. Result of KeyCiting *Twombly* using Westlaw's KeyCite feature. For a point of comparison, admittedly arbitrary, KeyCiting the seminal case *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), reveals a total of only 3,371 case citations over the past two centuries.

9. *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting).

10. *Id.* at 560–61 (majority opinion).

"plausibility" or the content of this new standard.[11] The result has been substantial confusion in the lower courts.[12]

This Article argues that *Twombly* is merely an extension of the familiar and often-used *Mathews v. Eldridge*[13] three-factor balancing test applied to property and liberty deprivations imposed by discovery, which commences after an unsuccessful motion to dismiss.[14] When viewed in this familiar framework, the analysis mandated by *Twombly* becomes straightforward, and indeed, well within the institutional competency of the judiciary.[15] This insight reveals that *Twombly* is not the radical departure alleged by Justice Stevens' dissent and by a number of commentators,[16] but rather is a logical progression in the Court's ever-expanding application of the *Mathews* balancing test.

Part II of this Article reviews the background of the *Twombly* decision, the opinion itself, and the reaction by lower courts and scholars. Part III discusses *Mathews* and describes how the Supreme Court has consistently extended the *Mathews* three-factor balancing test to a wide variety of civil and criminal cases. Part IV then demonstrates how *Twombly* is best read as expanding the *Mathews* three-factor analysis to require the dismissal of a complaint when potential discovery abuse violates procedural due process. Finally, Part V explores the ramifications of understanding *Twombly* as part of the ever-growing line of cases applying *Mathews* and discusses the likelihood that *Twombly* is a constitutional—rather than statutory—decision.

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11. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

12. Phillips v. County of Allegheny, 515 F.3d 224, 230–31 (3d Cir. 2008) ("What makes *Twombly*'s impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new 'plausibility' paradigm for evaluating the sufficiency of complaints."); Robbins v. Oklahoma *ex rel.* Dep't of Human Servs., 519 F.3d 1242, 1247 (10th Cir. 2008) ("We are not the first to acknowledge that [*Twombly*'s] new formulation is less than pellucid."); Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007) ("The nature and extent of that alteration is not clear . . . ."); *id.* at 178 (Cabranes, J., concurring) (suggesting that the Supreme Court clarify the matter); *see also* United States *ex rel.* Snapp, Inc. v. Ford Motor Co., 532 F.3d 496, 502 n.6 (6th Cir. 2008) ("At present, there is some confusion . . . ."); Edward D. Cavanagh, Twombly, *The Federal Rules of Civil Procedure and The Courts*, 82 ST. JOHN'S L. REV. 877, 889–91 (2008) (discussing the uncertainty and divergent jurisprudence resulting from *Twombly*); Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1059 ("The Supreme Court's plausibility paradigm abrogated fifty years of pleading jurisprudence and left in its place a vague and undefined standard."); Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts—Again*, FINDLAW'S WRIT, Aug. 13, 2007, http://writ.news.findlaw.com/dorf/20070813.html.

13. 424 U.S. 319 (1976).

14. *Id.*

15. *See infra* Part V.A.

16. *See, e.g.*, *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 305–15 (2007).

II. OVERVIEW OF *BELL ATLANTIC V. TWOMBLY*

This Part briefly reviews *Twombly*'s history and the Court's decision. It then explores the reactions of scholars and lower courts, which have been marked by confusion and uncertainty as to the meaning of the new "plausibility standard."

A. *Background*

In 1982, the Department of Justice and the American Telephone & Telegraph Company (AT&T) entered into a consent decree to settle their long-running dispute over AT&T's alleged violations of antitrust laws.[17] Under this consent decree, in 1984 AT&T divested its local telephone services into regional telephone companies,[18] often called "baby bells,"[19] which retained a monopoly over local service in their respective regions.[20] These "baby bells" would develop into such household names as Verizon, BellSouth, and Qwest.[21]

With the Telecommunications Act of 1996,[22] Congress withdrew its approval of these local monopolies and attempted to open up competition for local telephone and internet service.[23] Despite the efforts of Congress and the Federal Communications Commission, however, competition in local service markets did not develop, for reasons that still remain unclear.[24] William Twombly, acting as a class representative, filed a class action against the "baby bells" in the U.S. District Court for the Southern District of New York, alleging violations under § 1 of the Sherman Act.[25] The complaint alleged that local competition had failed to develop due to the defendants' anticompetitive behavior, both in keeping out new competitors and in agreeing not to enter each others' territories.[26]

In the district court, the "baby bells," under Rule 12(b)(6) of the Federal Rules of Civil Procedure, moved to dismiss the complaint for

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17. United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982).

18. *Id.* at 141–42.

19. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 549 (2007).

20. *Id.*

21. *Id.* at 550 n.1.

22. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

23. *Twombly*, 550 U.S. at 549.

24. *Id.* at 549–50; *see also* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (dismissing plaintiff's complaint alleging breach of the incumbent company's duty to share its network with competitors and holding that the case did not fall within the few exceptions to the antitrust law proposition that there is no duty to aid competitors).

25. 15 U.S.C. § 1 (2006) (prohibiting "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.").

26. *Twombly*, 550 U.S. at 550–51.

failure to state a claim upon which relief could be granted.[27] The district court analyzed the relevant Second Circuit precedent and discerned a requirement that plaintiffs show "at least one 'plus factor' that tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior."[28] Because it found no such "plus factors" present in the complaint before it, the court granted the motion to dismiss.[29]

The Second Circuit, however, vacated the district court's decision, reaffirming the continued validity of *Conley*'s "no set of facts" rule for evaluating motions to dismiss.[30] The court refused to carve out an exception to the *Conley* rule for antitrust cases, and reemphasized that the Federal Rules of Civil Procedure require only a "short and plain"[31] statement of facts in the complaint.[32] The court clarified that the "plus factors," tending to show a Sherman Act § 1 violation and upon which the district court had relied, were indeed appropriate for summary judgment or a directed verdict.[33] Yet these "plus factors" were, according to the Second Circuit, inappropriate on a motion to dismiss because the plaintiff would not yet have had the opportunity to pursue direct evidence of antitrust liability through discovery.[34]

B. *The Supreme Court Opinion*

The Supreme Court granted certiorari "to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct."[35] The Court thus appeared to have taken only a narrowly-defined antitrust case, unlikely to have broad ramifications outside of antitrust practice. Neither the parties nor any of the amicus curiae briefs requested the retirement of *Conley*'s "no set of facts" rule.[36]

After reviewing the facts and spending two paragraphs on the economic theory of parallel market conduct,[37] the Court delved into the "antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act."[38] The Court noted that an antitrust

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27. FED. R. CIV. P. 12(b)(6); Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 176 (S.D.N.Y. 2003) .

28. 313 F. Supp. 2d at 179.

29. *Id.* at 189.

30. Twombly v. Bell Atl. Corp., 425 F.3d 99, 106–07 (2d Cir. 2005).

31. FED. R. CIV. P. 8(a).

32. 425 F.3d at 108 (quoting FED. R. CIV. P. 8(a)).

33. *Id.* at 113–14.

34. *Id.* at 114–17.

35. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553 (2007).

36. *Id.* at 579 (Stevens, J., dissenting).

37. *Id.* at 553–54 (majority opinion).

38. *Id.* at 554–55.

complaint that is not dismissed will proceed to discovery.[39]

The Court then discussed the high burden that discovery imposes in terms of both money and time lost.[40] The Court cited various theoretical and empirical sources discussing how expensive discovery, and particularly antitrust discovery, can be.[41] For example, research shows that, regardless of the substantive area of law, discovery in cases where it is actively employed can account for as much as 90% of litigation costs.[42] The Court also noted that discovery can "take up the time of a number of other people."[43]

In response to the dissent's claim that "careful case management"[44] can check discovery abuse, the Court extensively discussed the inability of judicial oversight to avoid wasteful discovery.[45] Having painted this bleak portrait, the Court proceeded to retire *Conley*'s "'no set of facts' language."[46] In place of the *Conley* formulation, the Court stated that "plausibility" was required,[47] and indeed used the word "plausible" no fewer than eighteen times in its opinion.[48] But the Court rather disingenuously stated that it was not changing pleading standards.[49]

The Court then proceeded to apply what it called the "plausibility standard" to the complaint before it.[50] Drawing on economic theory and history,[51] the Court found that the plaintiffs' class complaint was insufficiently plausible, concluding that, "[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."[52]

C. *Reaction*

The Court's decision has created a great deal of uncertainty.[53] An initial cause of confusion lay in the question of scope: Did the decision apply just to antitrust cases or to all cases where a motion to dismiss

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39. *Id.* at 557–58.

40. *Id.* at 558–59.

41. *Id.*

42. *Id.* at 559 (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000)).

43. *Id.* at 558 (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

47. *Id.* at 573 (Stevens, J., dissenting).

45. *Id.* at 559 (majority opinion).

46. *Id.* at 567.

47. *Id.* at 560–61.

48. *Id.* at 553, 556–57 & nn.4 & 5, 558–60, 564, 566, 569 & n.14, 570 (including "plausible" in its different forms as noun, adjective, or adverb).

49. *Id.* at 569 n.14.

50. *Id.* at 560–61.

51. *Id.* at 567–68.

52. *Id.* at 570.

53. *See supra* note 12.

was filed?[54] After all, the Court had granted certiorari in *Twombly* on a very narrow antitrust issue, and peppered its discussion with antitrust economic theory and research.[55] But in the more recent case of *Iqbal*, the Court clarified what the circuit courts had already concluded, that *Twombly* applies to all civil cases.[56]

But *Iqbal* did little or nothing to address the core uncertainty introduced by *Twombly*: What is meant by "plausible"? The Court has given no guidance on the content of this vague term, and the lower courts have understandably been unable to fashion workable definitions.[57] In *Twombly*, the Court insisted that it was not creating a new standard, even as it expressly gave *Conley*'s "no set of facts" rule its "retirement"[58] and introduced a new "plausibility standard."[59] As a result, commentators have called *Twombly* a "Janus-like opinion"[60] that "threw a wrench into modern pleading jurisprudence."[61] One federal district court judge has stated, "We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim."[62]

III. THE EVER-EXPANDING APPLICATION OF *MATHEWS V. ELDRIDGE*

In contrast to *Twombly*, the 1976 case of *Mathews v. Eldridge*[63] has been met with nearly universal acclaim and acceptance as setting forth the standard for determining the requirements of procedural due process. Despite its humble beginnings as a case involving termination of disability benefits,[64] the *Mathews* test has grown into a core tenet of American jurisprudence.

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54. *See Leading Cases*, *supra* note 16, at 310 n.51 (collecting sources).

55. *Twombly*, 550 U.S. at 553.

56. Ashcroft v. Iqbal, 129 S. Ct. 1937,1953 (2009); *see, e.g.*, Adcock v. Freightliner LLC, 550 F.3d 369, 374 (4th Cir. 2008) (applying *Twombly* in a labor law case); Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean Geological Formation, 524 F.3d 1090, 1100 (9th Cir. 2008) (applying *Twombly* to the Natural Gas Act); Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) (applying *Twombly* in a civil rights case).

57. *See supra* note 6.

58. *Twombly*, 550 U.S. at 562–63.

59. *See* Iqbal v. Hasty, 490 F.3d 143, 155–58 (2d Cir. 2007).

60. Ryan Gist, Note, *Transactional Pleading: A Proportional Approach to Rule 8 in the Wake of* Bell Atlantic Corp. v. Twombly, 2008 WIS. L. REV. 1013, 1016.

61. *Id.* at 1014.

62. *See* McMahon, *supra* note 6, at 853.

63. 424 U.S. 319 (1976).

64. *Id.*

A. *Overview of* Mathews

The Supreme Court handed down *Mathews* six years into the procedural "due process revolution" launched by the 1970 watershed decision, *Goldberg v. Kelly*.[65] In *Goldberg*, the Court found that by not providing a hearing before terminating welfare recipients' benefits, the New York City Social Services Department had denied the beneficiaries procedural due process.[66] But *Goldberg* provided insufficient guidance for making procedural due process determinations in other areas.

In *Mathews*, the Court supplied this missing guidance with a three-factor test that remains hornbook law.[67] George Eldridge's social security disability benefits had been terminated without a pre-termination hearing.[68] Eldridge brought suit against David Mathews, the Secretary of Health, Education, and Welfare, challenging that the lack of pre-termination hearings violated procedural due process.[69]

The Court reemphasized that procedural due process "is not a technical conception with a fixed content unrelated to time, place and circumstances"[70] but "is flexible and calls for such procedural protections as the particular situation demands."[71] The Court then enunciated the three-factor test, which is now known as the "*Mathews* test":

> [1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[72]

The *Mathews* test is a way to compare two sets of procedures: It compares the baseline of "procedures used"—which is the first set of

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65. Goldberg v. Kelly, 397 U.S. 254 (1970); *see also* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 28–29 (1976) (calling *Goldberg* a "landmark case").

66. 397 U.S. at 266; *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 741–42 (1964).

67. *Mathews*, 424 U.S. at 324.

68. *Id.*

69. *Id.* at 324–25.

70. *Id.* at 334 (quoting Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961)).

71. *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

72. *Id.* at 335.

procedures[73]—against "additional or substitute procedural safeguards"—which constitutes the second set of procedures.[74] In *Mathews* itself, the baseline was the existing social security procedures, including pre-termination written communications and a post-termination evidentiary hearing.[75] The "additional or substitute procedural safeguards"[76] were mainly the pre-termination evidentiary hearing that Eldridge argued was necessary.[77]

The Court then set out to analyze the three factors. Considering the first factor—private interest—the Court found that a disabled worker had a significant interest in continued benefits, albeit less than a poor welfare recipient's interest in continued benefits.[78]

For the second factor, the Court considered the existing procedural system, which involved pre-termination written communication and provided a post-termination evidentiary hearing.[79] Against this existing procedural system, the Court considered the "additional or substitute procedural safeguards"[80] that Eldridge argued were necessitated by due process: a pre-termination evidentiary hearing.[81]

On the second factor, comparing the change in the "risk of an erroneous deprivation,"[82] the Court concluded that pre-termination evidentiary hearing would provide little additional value in reducing erroneous terminations of benefits.[83] Specifically, assessments of a worker's condition depended largely on written medical documentation, which was already considered extensively prior to termination, meaning that in-person pre-termination hearings would likely not improve accuracy.[84]

The Court then considered the third factor—the fiscal and administrative burdens of the alternative procedure—which it determined would involve a high cost.[85] The increased number of hearings, with a full opportunity to present evidence, would be burdensome on the administrative judges who handle hearings.[86] Moreover, benefits would continue to flow to potentially undeserving

73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 340–43.
79. *Id.* at 343–46.
80. *Id.* at 335.
81. *Id.* at 343–49.
82. *Id.* at 335.
83. *Id.* at 343–47.
84. *Id.*
85. *Id.* at 347–48.
86. *Id.*

recipients during this time of additional hearings, thereby diminishing the resources available to deserving recipients.[87] Balancing the three factors, the Court thereby determined that the alternative procedure of pre-termination hearings was not required by due process, and upheld the existing procedures.[88]

B. *Increasing Favor*

The *Mathews* three-factor test has become a staple of jurisprudence, touching many areas far afield of administrative law or benefits terminations. As Judge Richard Posner notes, the three-factor test is the "orthodox" approach to determining procedural due process.[89] It incorporates ideas of cost-benefit analysis beloved by scholars of law and economics, while also providing a benchmark for "justice."[90]

The Supreme Court has applied the *Mathews* test in a surprising variety of areas. For example, in *Connecticut v. Doehr*,[91] the Court made clear that the *Mathews* test applies to determining the constitutionality of procedural tools available to private civil litigants, and struck down Connecticut's prejudgment attachment statute.[92] The Court has also used the *Mathews* test as a benchmark for criminal procedure, using it to evaluate everything from the transfer of prisoners into "Supermax"facilities[93] to forfeitures of real property.[94]

The Court has even employed the *Mathews* test in deciding several terrorism-related cases. For example, in *Hamdi v. Rumsfeld*,[95] the plurality applied the *Mathews* test to determine that an alleged enemy combatant with U.S. citizenship, captured in Afghanistan but detained in a brig in South Carolina, was entitled to habeas corpus.[96] The plurality began its analysis by stating that "[t]he ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' . . . is the test that we articulated in *Mathews v. Eldridge*."[97] Further, in the recent case of *Boumediene v. Bush*,[98] the Supreme Court

87. *Id.*

88. *Id.* at 349.

89. Van Harken v. City of Chicago, 103 F.3d 1346, 1351 (7th Cir. 1997) (evaluating procedure for handling parking tickets).

90. *Id.*

91. 501 U.S. 1 (1991).

92. *Id.* at 10–11.

93. Wilkinson v. Austin, 545 U.S. 209, 224–29 (2005).

94. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–59 (1993).

95. 542 U.S. 507 (2004).

96. *Id.* at 528–37.

97. *Id.* (citations omitted).

98. 128 S. Ct. 2229 (2008).

again applied the *Mathews* test, striking down the Military Commissions Act of 2006 as providing insufficient process to detainees at the Guantanamo Naval Base.[99]

The *Mathews* test was, of course, created by the Burger Court and has no direct textual basis in the Constitution. But even Justice Scalia, dedicated to an originalist understanding of the Constitution, accepts the applicability of *Mathews*—at least whenever the Constitution does not already provide a relevant procedure,[100] as, for example, in cases where the Constitution specifies the availability of a jury trial.[101] This is a testament to *Mathews*' place at the core of American jurisprudence.

In light of the Supreme Court's deep—and growing—attachment to the *Mathews* test, it is not surprising that the lower federal and state courts have used it to evaluate alternative procedures ranging from domestic relation temporary restraining orders (TROs),[102] to sex offender commitment,[103] to parking tickets.[104]

C. *Applied to Civil Procedure in* Connecticut v. Doehr

In resolving the case of *Connecticut v. Doehr*,[105] the Court crafted an important variation on the *Mathews* three-part test, adapting it to private civil litigants' use of the court system. The Court replaced the government's interest with the adversary's interest for the third *Mathews* factor.

Brian Doehr had allegedly assaulted John DiGiovanni, who filed a tort suit in Connecticut state court.[106] DiGiovanni then made use of Connecticut's ex parte prejudgment attachment procedure to attach Doehr's house.[107] In order to effect this attachment, DiGiovanni submitted only an affidavit stating that he believed "probable cause" existed that he would win the tort suit.[108] Doehr responded to this attachment by filing a suit in federal court that eventually wended its

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99. *Boumediene*, 128 S. Ct. at 2268.

100. Hamdi v. Rumsfeld, 542 U.S. 507, 575–76 (2004) (Scalia, J., dissenting); Connecticut v. Doehr, 501 U.S. 1, 30–31 (1991) (Scalia, J., concurring); *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 36 (1991) (Scalia, J., concurring).

101. *Hamdi*, 542 U.S. at 573–76 (2004) (Scalia, J., dissenting). In general, Justice Scalia has often argued that notions of due process are relevant only when the Constitution does not already provide a specific answer. *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140, 145 (2006) ("[T]he Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details.").

102. Blazel v. Bradley, 698 F. Supp. 756, 763–64 (W.D. Wis. 1988).

103. People v. Litmon, 76 Cal. Rptr. 3d 122, 135–36 (Cal. Ct. App. 2008).

104. Van Harken v. City of Chicago, 103 F.3d 1346, 1351 (7th Cir. 1997).

105. 501 U.S. 1 (1991).

106. *Id.* at 5.

107. *Id.*

108. *Id.* at 6–7.

way to the Supreme Court.[109]

In analyzing Connecticut's prejudgment attachment statute, the Supreme Court cited *Mathews* and quoted its "truism that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[110] It then noted that *Mathews* weighed government interests against private interests, while procedural tools such as Connecticut's prejudgment attachment pitted private interests against other private interests.[111] As a result, the Court stated, "the inquiry is similar, but the focus is different."[112] The Court then laid out the applicable variation on the *Mathews* test:

> For this type of case, therefore, the relevant inquiry requires, as in *Mathews*, [1] consideration of the private interest that will be affected by the prejudgment measure; [2] an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and [3] in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.[113]

As in any *Mathews* analysis, the Court in *Doehr* had to compare an existing baseline of procedures against alternative procedures. Specifically, in *Doehr*, the existing baseline was the Connecticut prejudgment attachment statute, including its ex parte attachment upon the filing of an affidavit of "probable cause."[114] Meanwhile, the "additional or alternative safeguard" under consideration was a hearing prior to the attachment, which Doehr contended was necessary.[115] After considering this safeguard, four Justices went even further, analyzing the probable value of yet another "additional or alternative safeguard": the requirement of posting a bond.[116]

The Court briefly analyzed the first factor, noting that while attachment does not result in physical deprivation, "the Court has never

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109. *Id.* at 7.

110. *Id.* at 10 (quoting Mathews v. Eldridge, 424 U.S. 319, 334 (1976)) (quotation marks and alterations omitted).

111. *Id.* at 10–11.

112. *Id.* at 10.

113. *Id.* at 11.

114. *Id.* at 5, 12–13.

115. *Id.* at 15.

116. *Id.* at 18–23 (encompassing Part IV of the opinion, which included a plurality composed of Justice White joined by Justices Marshall, Stevens, and O'Connor).

held that only such extreme deprivations trigger due process concern."[117] Listing the potential consequences to private litigants whose property is attached, including impaired title and damaged credit, the Court found the private interest "significant."[118]

In considering the second factor, the Court compared Connecticut's procedure against the "additional or alternative safeguards" that might be provided, such as a pre-attachment hearing or posting a bond.[119] The Court concluded that the risk of erroneous deprivation under the existing procedures was "substantial"[120] and could easily be improved by requiring a pre-attachment hearing.[121] The four Justices willing to consider the further additional safeguard of requiring posting of a bond determined that due process also required that protection.[122]

Finally, the Court considered the third factor, which it had restated for private litigation as "the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have."[123] The Court concluded that the private "party seeking the prejudgment remedy," specifically the tort plaintiff John DiGiovanni, had virtually no interest in the prejudgment attachment, as opposed to later attachment.[124] The Court noted "there was no allegation that Doehr was about to transfer or encumber his real estate," so the alternative safeguard of providing a pre-deprivation hearing would not have harmed DiGiovanni's interest.[125] Additionally, the state's ancillary interest was nonexistent over the alternative safeguards, as state courts already provided post-deprivation hearings.[126]

Weighing the three *Mathews* factors, as restated for the protection of private litigants, the Court unanimously adjudged that procedural due process could not tolerate Connecticut's prejudgment attachment statute.[127] Accordingly it struck down the statute.[128]

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117. *Id.* at 12 (majority opinion).
118. *Id.* at 11–12.
119. *Id.* at 12–15.
120. *Id.* at 12.
121. *Id.* at 15.
122. *Id.* at 23 (plurality opinion).
123. *Id.* at 11 (majority opinion).
124. *Id.* at 16.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 24.

D. *Balancing and Reasonableness*

The *Mathews* test balances factors (1) and (2) against factor (3).[129] Factor (1) measures the private interest, while factor (2) is the decreased risk that this private interest will be erroneously taken away.[130] Factors (1) and (2) together thus account for the total benefit, in terms of lowered risk of erroneous deprivation, of adopting an alternative procedural safeguard.[131] On the other side, factor (3) accounts for the total costs to the government and adverse parties, of adopting the alternative safeguard.[132] If the benefits shown by factors (1) and (2) exceed the costs shown by factor (3), then procedural due process requires adopting the alternative safeguard.[133] To understand the application of the *Mathews* test, one must consider the scope of each of the three factors.

Factor (1) is the private interest at stake. In *Mathews* this was the property interest in the social security disability benefit,[134] while in *Doehr* it was the property interest in having unclouded title to one's real estate.[135] Of course, the factor may also include or consist entirely of a liberty interest, such as the freedom of an enemy combatant,[136] the interest of an Ohio prisoner not being in a "Supermax" facility,[137] or in having a good reputation.[138]

Factor (2) in the *Mathews* test is the decrease in risk of erroneous deprivation of the private interest. So if the proposed procedure does little to decrease the risk of erroneous deprivation over the existing baseline procedures, then the value of this variable will be small. But if the proposed procedure significantly decreases the risk of erroneous deprivation, then the value of this variable will be large. In *Mathews* itself, this factor had little weight, as the Court found that the accuracy of the existing baseline, pre-deprivation consideration of written medical evidence, would not be significantly improved by in-person pre-deprivation hearings.[139] By contrast, in *Doehr*, this factor had

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129. The *Mathews* test may be expressed as an extremely simple mathematical formula involving the three factors. *See* RICHARD J. PIERCE JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 281 (5th ed. 2009). Procedural due process requires an alternative procedure if the following inequality is true: $P \times V > C$. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

135. Connecticut v. Doehr, 501 U.S. 1, 11–12 (1991).

136. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004).

137. Wilkinson v. Austin, 545 U.S. 209, 213 (2005).

138. Goss v. Lopez, 419 U.S. 565, 574–75 (1975). *But see* Sandin v. Conner, 515 U.S. 472 (1995) (illustrating a general trend by the Court to restrict the definition of liberty interests).

139. *Mathews*, 424 U.S. at 344.

greater weight, as a litigant could invoke prejudgment attachment in a very weak case upon filing an affidavit of "probable cause."[140]

Finally, *Mathews* factor (3) is the increased cost—or risk of loss—on the government or private adversary. In *Mathews* itself, this variable was simply the additional cost of a hearing prior to social security disability benefits termination, which Eldridge argued was necessary.[141] In *Doehr*, which involved private litigants, this factor was "the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections."[142] Specifically in *Doehr*, factor (3) consisted primarily of the risk that DiGiovanni, the tort plaintiff allegedly assaulted by Brian Doehr, would have no assets to satisfy his judgment if he prevailed in his tort suit.[143] Additionally, the government had an interest in forgoing the pre-attachment hearing, which the Court characterized as de minimis since it would impose no additional costs on the courts.[144]

In incorporating the government's interests into factor (3), the Court used very flexible language: "any ancillary interest the government may have in providing the procedure or forgoing the added burden."[145] This language recognizes that the government's interest may increase—or decrease—factor (3)'s weight, as the government may have an interest in either "providing" or "forgoing" the alternative procedure.[146] In other words, the government's interests may augment or offset the adverse party's interests as captured in factor (3). In this way, the *Mathews* test, as adapted to private litigation by *Doehr*, recognizes that the government's interest may weigh either against or in favor of adopting the alternative procedure.

Commentators[147] have noted that the *Mathews* three-factor balancing test is essentially the same as the three-factor negligence test set out by Judge Learned Hand in the famous case *United States v. Carroll Towing Co*.[148] In that admiralty case involving barges, Judge Hand set out a comparison of the "(1) [t]he probability that [the boat] will break away; (2) the gravity of the resulting injury, if she does; [and] (3) the burden of adequate precautions."[149] In effect, the *Mathews* test, as a variant of

140. *Doehr*, 501 U.S. at 13.
141. *Mathews*, 424 U.S. at 347.
142. *Doehr*, 501 U.S. at 11.
143. *Id.* at 16.
144. *Id.*
145. *Id.* at 11.
146. *Id.*
147. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 593–94 (7th ed. 2007).
148. 159 F.2d 169 (2d Cir. 1947).
149. *Id.* at 173. Learned Hand then put this comparison into algebraic terms: "Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P:

Judge Hand's test, aims to ensure that agencies and courts do not negligently provide inadequate procedural protections. Judge Hand's test has become the core theoretical and practical underpinning of "reasonableness" in tort law.[150] Similarly, under the *Mathews* balancing test, procedural due process requires "reasonable" process.[151]

IV. *TWOMBLY*'S APPLICATION OF THE *MATHEWS* FACTORS

Many courts and scholars have found the heightened "plausibility" standard introduced in *Twombly* to be revolutionary.[152] But this Article argues that *Twombly* is simply another step in the Court's continued extension of the *Mathews* test, specifically to the possible property and liberty deprivations worked by discovery. In *Twombly*, the Court continued the trend utilized in *Doehr* of applying *Mathews* to determine whether the tools available to private litigants violate procedural due process.[153]

Indeed, in *Twombly* the Court addressed the same relevant inquiries for the three *Mathews* factors: (1) private interests; (2) decreased likelihood of erroneous deprivation; (3) government or adversary's interest.[154] The Court addressed these factors, moreover, in the same order as *Mathews* and its progeny list and address the three factors,[155] further demonstrating how *Twombly* is a logical extension of the *Mathews* test.

A. *Factor 1: Private Interests*

The first *Mathews* factor is, of course, the private interest affected, either of life, liberty, or property.[156] In *Twombly*, the Court considered

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i.e., whether B < PL." *Id.*

150. *See, e.g.*, Llaguno v. Mingey, 763 F.2d 1560, 1564 (7th Cir. 1985); Andros Shipping Co. v. Panama Canal Co., 298 F.2d 720, 725–26 (5th Cir. 1962). *See generally* Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813 (2001) (discussing how Judge Hand's test fits into the broader fabric of negligence law).

151. *Cf.* Siebert v. Severino, 256 F.3d 648, 659 (7th Cir. 2001) (applying the *Mathews* test to determine whether a procedural requirement is reasonable).

152. *See supra* note 12.

153. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007).

154. *Id.*

155. The Court in *Twombly* addresses the *Mathews* factors in order, discussing (1) discovery costs and the "time of a number of other people," *id.*; (2) the baseline of the *Conley* discovery-friendly approach and its risks, *id.* at 561–62; and (3) evaluating the adversary's interests, especially the weak value of his claims, *id.* at 566–67.

156. It is well established that procedural due process is required whenever a deprivation is worked on a relatively small group of people, but not when it affects a large group. *Compare* Londoner v. City & County of Denver, 210 U.S. 373, 386 (1908) (holding that due process requires a hearing for individuals), *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) ("Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. . . . General statutes

how proceeding to discovery in an antitrust suit would deprive litigants[157] of property and liberty interests.

1. Property Interest: The Monetary Cost of Discovery

Money is clearly a form of property,[158] and the *Twombly* court extensively discussed the monetary costs imposed on defendants by discovery in antitrust cases.[159] The Court noted "that proceeding to antitrust discovery can be expensive,"[160] citing lower court cases that discussed antitrust cases' "inevitably *costly* and protracted discovery phase"[161] and deploring "the *costs* of modern federal antitrust litigation."[162] It also cited scholarship that developed models explaining "the unusually high *cost* of discovery in antitrust cases."[163]

But the Court did not stop at citing authority discussing the high cost of discovery in antitrust cases. It also quoted from a treatise discussing the "expenditure of *time and money* by the parties"[164] on discovery in cases from all substantive areas. The Court also referred to a memorandum from the Chair of the Advisory Committee on the Civil Rules of Civil Procedure noting that in all types of cases in which the parties actively utilize it, discovery can account for as much as 90% of litigation costs.[165]

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within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard."). There were only four defendants in *Twombly*, and most lawsuits involve a discrete, limited number of defendants. As a result, the strictures of procedural due process apply in such a litigation context.

157. In most circumstances, the litigant at risk of deprivation in the *Twombly-Mathews* analysis will be the defendant. But that will not always be the case, as the *Twombly-Mathews* analysis also applies to defendants asserting counterclaims against plaintiffs, crossclaims, and claims against third–party defendants. *See* FED. R. CIV. P. 13. The language in Rule 12(b)(6), governing motions to dismiss for failure to state a claim, applies equally to a plaintiff's claim as it does to a counterclaim or a crossclaim. *See* FED. R. CIV. P. 12(b); *cf.* R. David Donoghue, *The Uneven Application of* Twombly *in Patent Cases: An Argument For Leveling The Playing Field*, 8 J. MARSHALL REV. INTELL. PROP. L. 1 (2009) (discussing the peculiar problems that *Twombly* has caused for defendants in patent litigation).

158. Town of Castle Rock v. Gonzales, 545 U.S. 748, 789 (2005) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571–72 (1972)).

159. *Twombly*, 550 U.S. at 558.

160. *Id.*

161. *Id.* (citing Asahi Glass Co. v. Pentech Pharms., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)) (emphasis added).

162. *Id.* (citing Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)) (emphasis added).

163. *Id.* (citing William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1898–99 (2003)) (emphasis added).

164. *Id.* (citing 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2004)) (emphasis added).

165. *Id.* at 559 (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on

Having reviewed the high monetary costs of discovery, particularly antitrust discovery, the Court concluded that the "potential *expense* is obvious enough in the present case."[166] In particular, the Court noted the vast amount of data that would be at issue[167] and the huge expense that discovery would impose on the defendants.[168]

2. Liberty Interest: "The Time of a Number of Other People"

The guarantee of procedural due process obviously also protects private interests in liberty,[169] including freedom from being detained by those acting under governmental authority. Although the Court certainly placed less of an emphasis on the liberty interests than on the property interests infringed by costly discovery, it did note that proceeding to discovery would allow the plaintiffs to "take up the *time* of a number of other people,"[170] presumably mainly through depositions.

Depositions indeed invade the liberty of the deponent, who is judicially compelled to attend the deposition under threat of a court's contempt powers.[171] To support such a conclusion, the Court relied heavily upon Judge Frank Easterbrook's article *Discovery as Abuse*,[172] which makes the point about the loss of liberty much more bluntly, stating that discovery requires "taking employees of a corporation out of work and holding them *captive* in lawyers' offices during depositions."[173]

B. *Factor 2: Reduction in Risk Through Alternative Procedure*

The second *Mathews* factor, as stated by the *Doehr* Court, is "the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards."[174] This factor expressly contemplates the comparison of baseline procedures against additional or alternative procedures.

The baseline of "procedures under attack" in *Twombly* was the

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Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000)).

166. *Id.* (emphasis added).

167. *Id.*

168. *Id.*

169. U.S. CONST. amends. V, XIV, § 1.

170. *Twombly*, 550 U.S. at 558 (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)) (emphasis added).

171. *See* FED. R. CIV. P. 30(a)(1) ("The deponent's attendance may be compelled by subpoena under Rule 45.").

172. *Twombly*, 550 U.S. at 559–60 & n.6 (quoting Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989)).

173. Easterbrook, *supra* note 172, at 645 (emphasis added).

174. Connecticut v. Doehr, 501 U.S. 1, 11 (1991).

modern system of discovery, followed by summary judgment.[175] The alternative safeguard contemplated and ultimately ordered by the Court was the granting of a motion to dismiss.[176]

The *Twombly* Court recounted "the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."[177] It made clear that the risk of erroneous deprivation was unacceptably high under the baseline of normal discovery and summary judgment, no matter how skillfully that baseline procedure is applied.[178] The Court found that "it is *self-evident* that the problem of discovery abuse cannot be solved by 'careful scrutiny of evidence at the summary judgment stage.'"[179] The risks of erroneous deprivation under the baseline procedure of discovery, followed by summary judgment, could not be mitigated even by "careful case management,"[180] thereby weighing strongly in favor of the alternative safeguard of dismissal.

To support its assertion that discovery created an unacceptable risk of erroneous deprivation, the Court once again relied heavily on Judge Easterbrook's scathing critique of modern discovery.[181] The Court's conclusion suggests a lack of hope in the current system: "Judges can do little about impositional discovery" [182] and "[g]iven the system that we have, the hope of effective judicial supervision is slim."[183]

The Court also noted an additional consideration that increased the risk of erroneous deprivation—"the threat of discovery expense [that] will push cost-conscious defendants to settle even anemic cases before reaching" summary judgment.[184] This outcome, of course, results in a deprivation of property regardless of whether liability can be established after all facts come to light. This situation presents the quintessential risk of erroneous deprivation—liability imposed without regard to legal and factual merits.

C. *Factor 3: Adversary's Interest*

The third factor to be weighed in the litigation context, as stated in *Doehr*, is principally "the interest of the party seeking the prejudgment remedy."[185] In *Doehr*, that interest was the marginally increased likelihood that DiGiovanni would have available "assets to satisfy his

175. *Twombly*, 550 U.S. at 558–61.
176. *Id.*
177. *Id.* at 559.
178. *Id.*
179. *Id.* (quoting *id.* at 573 (Stevens, J., dissenting)) (emphasis added).
180. *Id.*
181. *Id.*
182. *Id.* (quoting Easterbrook, *supra* note 172, at 638).
183. *Id.* at 560 n.6.
184. *Id.* at 559.
185. Connecticut v. Doehr, 501 U.S. 1, 11 (1991).

judgment if he prevailed on the merits of his action."[186]

Stated another way, this factor was Doehr's interest in having assets to satisfy the judgment, discounted by the likelihood that, without the attachment, there would be insufficient assets available. But the Court found that likelihood to be quite small, noting that "there was no allegation that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment."[187] Because of this small likelihood, the Court gave factor (3) minimal weight.[188]

In other cases applying the *Mathews* test, the Court has similarly analyzed factor (3) in light of the adversary's interest discounted by the likelihood that the alternative procedure would leave the adverse party without any remedy, even in cases where the adverse party has an actual entitlement to a remedy. For example, the Court has required *pre*-deprivation process for civil forfeiture of real property by the government,[189] but allows mere *post*-deprivation hearings for civil forfeiture of moveable personal property.[190] The Court justifies these divergent results by noting that the likelihood that moveable personal property will be moved elsewhere makes the provision of only post-deprivation process acceptable.[191]

The plaintiffs in *Twombly* similarly had an interest in damages if the defendants had indeed violated the Sherman Act.[192] Just as striking down the Connecticut pre-judgment attachment at issue in *Doehr* created the possibility that plaintiffs such as DiGiovanni might not have assets to satisfy any judgment, granting the motion to dismiss in *Twombly* meant that plaintiffs might not receive recovery for the defendants' anticompetitive behavior. But just as the *Doehr* Court discounted the likelihood that DiGiovanni would not have assets to satisfy his judgment,[193] the *Twombly* court found it unlikely that the plaintiffs would uncover evidence of anticompetitive behavior.[194]

Much of the *Twombly* Court's discussion of the complaint can be seen as discounting the plaintiffs' right to recover based on the low likelihood that an antitrust violation had occurred.[195] Drawing upon economic theory and intuition, the Court made clear that nothing in the

186. *Id.* at 16.
187. *Id.*
188. *Id.*
189. United States v. James Daniel Good Real Prop., 510 U.S. 43, 43–44 (1993).
190. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679–80 (1974).
191. *James Daniel Good Real Prop.*, 510 U.S. at 56–57.
192. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 564–70 (2007).
193. *Doehr*, 501 U.S. at 16.
194. *Twombly*, 550 U.S. 544, 564–70 (2007).
195. *Id.*

complaint suggested any likelihood of success.[196] It noted that "resisting competition is routine market conduct"[197] and that not entering competitors' markets is "not suggestive of conspiracy, not if history teaches anything."[198]

In discussing the lack of plausibility in the *Twombly* plaintiffs' complaint, the Court effectively determined that the plaintiffs had very little legitimate interest in being allowed to proceed to discovery versus having their complaint dismissed.[199] As a result, the plaintiffs had a minimal interest under factor (3) of *Mathews*.[200]

The Court additionally recognized that the attorneys behind the *Twombly* class action were acting rationally in bringing the suit because of the "*in terrorem* increment of the settlement value"[201] posed by the extensive discovery that would be required.[202] Yet the *Mathews* analysis does not take into consideration such illegitimate interests. The prejudgment attachment at issue in *Doehr*, for example, undoubtedly gave plaintiffs a stronger position in negotiating settlements, but the *Doehr* Court did not consider that advantage as contributing in any way to *Mathews* factor (3).[203]

D. *Balancing the* Mathews *Factors*

Recalling that the *Mathews* test involves balancing factors (1) and (2) against factor (3),[204] the Supreme Court's analysis shows why dismissal was justified as an alternative procedure to discovery. The *Twombly* Court gave every reason to believe that the weight of private interests of the defendants, *Mathews* factor (1), was great,[205] based on the huge expense of discovery, both in terms of money and the time of individuals held captive in depositions.[206] Similarly, the Court determined that the reduction in the risk of erroneous deprivation through using the alternative procedure of dismissal, *Mathews* factor

196. *Id.* at 566.

197. *Id.*

198. *Id.* at 567.

199. *Id.*

200. The U.S. Supreme Court has, more generally, registered its suspicion of class actions in recent years. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 84–85 (2006) (finding federal preemption of state law securities class actions); Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 346 (2005) (affirming dismissal of securities fraud suit); *see also* Saritha Komatireddy Tice, *A "Plausible" Explanation Of Pleading Standards*, 31 HARV. J.L. & PUB. POL'Y 827, 837 (2008) (discussing the Supreme Court's solidifying hostility toward litigation).

201. *Twombly*, 550 U.S. at 558 (quoting *Dura Pharms., Inc.*, 544 U.S. at 347).

202. *Id.*

203. *Id.*

204. *See supra* Part III.D.

205. *Twombly*, 550 U.S. at 558.

206. *Id.*

(2), was also substantial.[207] It noted that careful case management and summary judgment would come too late to avoid the deprivation worked by discovery.[208]

By contrast, it appears that the interests of the plaintiffs, *Mathews* factor (3), weighed less, based on the Court's reading of the complaint. There was little reason to believe that the plaintiffs had a real, legitimate claim. As a result, by allowing dismissal of the suit as an alternative procedure to allowing discovery, the plaintiffs lost little of legitimate value.

Weighing all three factors yields a clear result. Both factors (1) and (2) are substantial, with large private interests involved, and with a significant decrease in the likelihood of erroneous deprivation of these large private interests. Yet factor (3) is insubstantial, given the lack of reason to believe that the plaintiffs had a valid claim. Viewed in this manner, dismissing the *Twombly* complaint was clearly proper under the *Mathews* three-factor test, and it is unsurprising that this disposition garnered the votes of seven Justices.[209]

E. *Stevens' Dissent*

Justice Stevens, joined by Justice Ginsberg, dissented, arguing largely that the majority failed to adhere to long-standing precedent.[210] Yet Justice Stevens did not reject the *Mathews*-based analysis, but simply would have adopted a different baseline.[211]

As noted earlier, the *Mathews* test is really a way to compare proposed "additional or substitute procedural safeguards" against a baseline of existing procedures.[212] The majority viewed the baseline as the textbook course of a civil action in federal court, moving through full discovery, summary judgment, and perhaps trial.[213]

But Justice Stevens saw a different baseline, involving "careful case management, including strict control of discovery."[214] He wrote, "[I]f I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint."[215] He would have allowed, perhaps, only a deposition of "at least one responsible executive representing each"

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207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 577–78 (Stevens, J., dissenting).
211. *Id.*
212. *See supra* text accompanying notes 73–74.
213. *See, e.g.*, GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE 1–14 (9th ed. 2005).
214. *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting).
215. *Id.* at 593.

defendant.[216]

This baseline, of course, provides little deprivation of the private interests of the defendants, *Mathews* factor (1). Against this baseline of limited discovery, the dissent argued that dismissal was not justified. Although attitudes on stare decisis and antitrust law[217] may have influenced Justice Stevens' dissent, this difference regarding baselines perhaps explains the divergence within the *Twombly* Court.

F. *Lack of Interlocutory Review*

For both the majority and dissent in *Twombly*, the baseline procedure under consideration was full, extraordinarily expensive, and time-consuming discovery against the defendants. It appears that all nine Justices agreed that this baseline was inappropriate, but differed over the relevant alternative to consider. While the majority found dismissal to be the appropriate alternative, the dissent would have adopted the plaintiff's "proposed . . . plan of 'phased discovery' limited to the existence of the alleged conspiracy and class certification."[218]

Why did the majority opt for dismissal as the appropriate alternative procedure against which to apply *Mathews*? Some might see it as draconian to dismiss a case entirely because of the potential burdens of discovery. The majority's primary motivation was doubtless "the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."[219]

But the majority might also have preferred dismissal as the appropriate alternative partly because of the unavailability of interlocutory review of discovery orders, either by appeal or writ of mandamus. The federal courts strongly disfavor interlocutory review of district courts' discovery rulings.[220] Thus, the normal route for interlocutory appeal of a discovery order is to refuse to comply, be cited for criminal contempt, and immediately appeal the criminal contempt citation.[221] This route is not for the faint of heart and is not sensible

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216. *Id.*

217. *Id.* at 594 (referring to the "common sense of Adam Smith" regarding anticompetitive tendencies). Note that Justice Stevens was an antitrust practitioner and academic earlier in his career. *See* Spencer Weber Waller, *Market Talk: Competition Policy In America*, 22 L. & SOC. INQUIRY 435, 445 (1997).

218. *Compare Twombly*, 550 U.S. at 593 (Stevens, J., dissenting), *with id.* at 560 n.6 (majority opinion). Note that Justice Breyer, in his dissent in *Ashcroft v. Iqbal*, ultimately argued for this alternative of phased discovery as the proper way to vindicate this interest in the qualified-immunity context. 129 S. Ct. 1937, 1961–62 (2009).

219. *Twombly*, 550 U.S. at 559.

220. *See* United States v. Nixon, 418 U.S. 683, 690–91 (1974); MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116, 119 (4th Cir. 1994); Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz., 881 F.2d 1486, 1490 (9th Cir. 1989); *see also* 28 U.S.C. §§ 1291, 1292 (2006).

221. 15B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.23, 123

without a very strong argument against the discovery. Yet even then, this route fails to offer a realistic avenue for constitutional review of the totality of discovery in a case. The appellate court would not be able to see and consider and review the aggregate deprivation worked upon the party, only the deprivation worked by individual discovery orders.

Requesting a writ of mandamus from an appellate court has this same drawback and is nearly impossible for litigants to obtain except in "really extraordinary" cases.[222] Courts of appeal are thus unlikely to find the normal deprivations of discovery to be "really extraordinary."

The lack of review of interlocutory discovery orders perhaps helps in understanding why the majority in *Twombly* found dismissal to be the appropriate baseline for *Mathews* analysis. In reviewing the dismissal of a case, appellate courts can review the constitutionality of the deprivations potentially worked by the entire range of discovery likely to bear on the case.

G. *Form 9*

An analysis of the majority's and the dissent's application of *Mathews* explains why the majority in *Twombly* was so easily able to reaffirm the validity of one of the factually simplest sample forms provided with the Federal Rules of Civil Procedure.[223] This form—which was numbered Form 9 when *Twombly* came down but has since been renumbered Form 11—provides a model for filing suit for medical expenses from a car accident.[224] This form is a mere four sentences

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(2d ed. 1992).

222. Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 380 (2004) (quoting *Ex parte* Fahey, 332 U.S. 258, 259–60 (1947) (cautioning that mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes")). Appellate courts rarely issue mandamus regarding discovery that is burdensome in terms of time and expenditures, unless some greater interest is at stake, such as attorney-client privilege or separation of powers. *See id.* at 371 (noting "[s]pecial considerations applicable to the President and the Vice President"); *id.* at 369 (referring to "ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise"). *See generally* 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3935.3, 618 (2d ed. 1996) (discussing mandamus use in discovery context, where it "has been used as a tool of nearly-last resort," often to protect against discovery of privileged information).

223. FED. R. CIV. P. Form 11 (2007).

224. *Id.* This model form states in full:

> 1. (Statement of Jurisdiction—See Form 7.)
> 2. On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.
> 3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $_____.
> Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.

long, and allows a plaintiff to file suit under the Federal Rules of Civil Procedure claiming no more than the time and place of the accident, alleging negligence, and claiming damages.[225]

Justice Stevens' dissent claimed that this form showed how the Federal Rules of Civil Procedure contemplated very little in the way of factual allegations in a complaint.[226] Justice Stevens noted that in prior decisions the Supreme Court had used Form 9 "as an example of 'the simplicity and brevity of statement which the rules contemplate,'"[227] in opposition to the detailed factual allegations he claimed the majority opinion would now require from plaintiffs.[228]

The *Twombly* majority countered that Form 9 provides much greater detail on the underlying claim than was provided by the *Twombly* plaintiffs: "A defendant wishing to prepare an answer in the *simple fact pattern* laid out in Form 9 would know what to answer; a defendant seeking to respond to [Twombly's] conclusory allegations in the [Sherman Act] § 1 context would have little idea where to begin."[229] The Court's reasoning goes directly to *Mathews* factor (1), the private interest that might be deprived, as a Form 9 complaint would require significantly less in discovery costs, both monetary and time-wise.[230] Therefore, viewing *Twombly* as an extension of the *Mathews* balancing test to discovery explains how the majority could reaffirm the continuing validity of Form 9.

H. *Making Sense of Recent Dismissal Jurisprudence*

The Supreme Court's recent dismissal jurisprudence becomes much more coherent by viewing *Twombly* as applying the *Mathews* test to the deprivations worked by discovery.

1. *Erickson v. Pardus*

Just two weeks after deciding *Twombly*, the Supreme Court decided

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Id. This form was renumbered in late 2007, so at the time of the *Twombly* decision, it was known as Form 9. *See id.*

225. *Id.*

226. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 575–76 (2007) (Stevens, J., dissenting) ("The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9 . . . .").

227. *Id.* at 576.

228. *Id.*

229. *Id.* at 565 n.10 (majority opinion) (emphasis added).

230. Implicit in the *Twombly* majority's analysis of Form 11 was likely also the presumption that *Mathews* factors (2) and (3) assumed more normal values than in Twombly's complaint. Specifically, there is no unusual risk of erroneous deprivation in automobile accident cases, as the threat of massive discovery costs are unlikely to lead to premature settlements. *Cf. id.* at 557–59. Automobile accident cases also typically have a good chance of success. *Cf. id.* at 565 n.10.

another case reviewing a grant of a motion to dismiss: *Erickson v. Pardus*,[231] which was decided per curiam. William Erickson was a prisoner in a Colorado state prison and filed a pro se suit against prison officials, alleging that they had wrongly terminated his liver treatment despite his hepatitis C, thereby endangering his life in violation of the Eighth and Fourteenth Amendments.[232] The district court granted the prison officials' motion to dismiss, and the Tenth Circuit affirmed, finding Erickson's allegations to be "conclusory."[233]

But the Supreme Court vacated the Tenth Circuit's judgment and remanded, finding that the lower courts had completely disregarded the liberal requirements of notice pleading.[234] Although *Twombly* expressly retired *Conley*'s "no set of facts" language, the Court in *Erickson* quoted from a portion of *Twombly* that was, in turn, quoting from a different portion of *Conley*.[235] The quoted language from *Conley* discussed the requirement that the complaint need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[236] The Court found that Erickson's complaint easily met this requirement, particularly given that he filed the complaint pro se.[237]

Not surprisingly, *Erickson* thus generated substantial confusion among scholars and the lower courts about the meaning of *Twombly*.[238] It could be argued that the only firm conclusion one can draw from *Erickson* is that *Twombly* has not entirely overruled *Conley* or completely revolutionized the pleading standards.[239]

But an understanding of *Twombly* as an application of the *Mathews* three-factor test to discovery easily explains the distinction between *Twombly* and *Erickson*. The prison officials' private interest in avoiding discovery, *Mathews* factor (1) in determining whether to dismiss the complaint, was likely quite small given the fairly concrete allegations of harm, which could be determined with very little discovery. And while the Supreme Court noted that there was some risk of erroneous deprivation,[240] *Mathews* factor (2), it was not unusually large. On the

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231. 551 U.S. 89 (2007) (per curiam).

232. *Id*. at 89–90.

233. *Id.* at 90 (quoting Erickson v. Pardus, 198 F. App'x 694, 698 (10th Cir. 2006)).

234. *Id.* at 94.

235. *Id.* at 93.

236. *Id.* (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

237. *Id.* at 94.

238. *See* Iqbal v. Hasty, 490 F.3d 143, 157 (2d Cir. 2007) (noting that *Erickson* was one of the "conflicting signals creat[ing] some uncertainty as to the intended scope of the Court's decision" in *Twombly*).

239. McMahon, *supra* note 6, at 861 ("Perhaps *Erickson* simply means that *Twombly*'s 'plausibility' standard, like all pleading standards, is to be applied less stringently to pro se plaintiffs.").

240. *Erickson*, 551 U.S. at 91–93 ("It may in the final analysis be shown that the District

other hand, prisoner Erickson's interest, factor (3), was quite substantial, as there was a possibility that he could die without his liver treatment.[241] Under a *Mathews* analysis, it was clear that the defendant prison officials did not deserve the alternative procedure of dismissal as an alternative to discovery and summary judgment.[242]

2. *Swierkiewicz v. Sorema N.A.*

The Supreme Court's dismissal jurisprudence prior to *Twombly* presaged the move toward analysis of motions to dismiss under the *Mathews* three-part test. For example, in the 2002 case, *Swierkiewicz v. Sorema N.A.*,[243] the Court addressed what was required in an employment discrimination complaint to survive a motion to dismiss.[244] The unanimous *Swierkiewicz* Court held that no heightened pleading was required.[245] As a result, many lower courts have interpreted *Twombly* as overruling *Swierkiewicz* at least in part.[246] But this interpretation seems highly implausible, given that just five years separated the two cases; that *Twombly*'s author joined the *Swierkiewicz* opinion;[247] that *Swierkiewicz*'s author joined the *Twombly* majority;[248] and that five of the seven Justices on the Court for both cases joined both opinions.[249]

Rather, *Swierkiewicz* is entirely consistent with *Twombly* when *Twombly* is understood as an application of the *Mathews* test to discovery. As noted earlier, *Mathews* is used to compare alternative procedures against a baseline, and in determining how to handle a motion to dismiss, the relevant baseline is discovery, summary judgment, and other pretrial procedures for determining the merits of a

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Court was correct to grant respondents' motion to dismiss. That is not the issue here, however.").

241. *Id.* at 94 ("The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was 'endangering [his] life.'").

242. *Id.*

243. 534 U.S. 506 (2002).

244. *Id.*

245. *Id.*

246. *See, e.g.*, Hughes v. Colo. Dep't of Corrs., 594 F. Supp. 2d 1226, 1240 (D. Colo. 2009); Harley v. Paulson, No. 07-3559, 2008 WL 5189931, at *3 (D.N.J. Dec. 9, 2008); Kamar v. Krolczyk, No. 1:07-CV-0340 AWI TAG, 2008 WL 4427264, at *8 (E.D. Cal. Sept. 26, 2008); Premier Pork L.L.C. v. Westin, Inc., No. 07-1661, 2008 WL 724352, at *3 (D.N.J. Mar. 17, 2008); Aztec Energy Partners, Inc. v. Sensor Switch, Inc., 531 F. Supp. 2d 226, 228 (D. Conn. 2007).

247. Justice Souter, the author of *Twombly*, joined in *Swierkiewicz*.

248. Justice Thomas, the author of *Swierkiewicz*, joined in *Twombly*.

249. These five Justices are Justices Scalia, Kennedy, Thomas, Souter, and Breyer. It appears likely that at least one of the two Justices to join the Court between *Swierkiewicz* and *Twombly*, Chief Justice Roberts, would have joined in both. Notably, in *Jones v. Bock*, 549 U.S. 199, 224 (2007), Roberts reaffirmed the pleading standard of *Swierkiewicz*.

claim. The *Swierkiewicz* Court evinced a view of this baseline in the employment discrimination context quite different from the *Twombly* Court's understanding in the antitrust context, noting that "the provisions for pretrial procedure and summary judgment [are] *so effective*, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court."[250] In short, the different views of the baseline meant that *Mathews* factors (1) and (2) weighed much more in the plaintiff's favor in *Swierkiewicz* than in *Twombly*.

Factor (3) in the *Mathews* test also likely played a significant role in the different results in *Swierkiewicz* and *Twombly*. Recall that in litigation between private parties, factor (3) is primarily the adverse party's interest, but "with, nonetheless, due regard for any ancillary interest the government may have."[251] Moreover, the Court has steadfastly recognized a very powerful government interest in ending discrimination.[252] Given that all three *Mathews* factors had different weights in *Swierkiewicz* than in *Twombly*, these cases may be easily harmonized.

3. *Ashcroft v. Iqbal*

In May 2009, a sharply-divided 5–4 Supreme Court decided *Ashcroft v. Iqbal*,[253] the latest Supreme Court case to address pleading standards. The plaintiff in that case, Javaid Iqbal, was a Pakistani Muslim who was detained in a Brooklyn detention facility and harshly treated after the September 11, 2001 terrorist attacks.[254] He brought suit alleging unconstitutional treatment against his jailors and a number of officials, including former attorney general John Ashcroft and FBI director Robert Mueller, whom Iqbal accused of creating the policies that led to his harsh detention.[255] The Second Circuit found the complaint sufficient to survive a motion to dismiss after *Twombly*,[256] but the Supreme Court granted certiorari with respect to Ashcroft and Mueller and reversed.[257] Most of the opinion focused on determining the

250. *Swierkiewicz*, 534 U.S. at 513 (quoting from 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, 98 (3d ed. 2004)).

251. Connecticut v. Doehr, 501 U.S. 1, 11 (1991). *See also supra* text accompanying notes 185–95.

252. *See, e.g.*, Crawford v. Metro. Gov't of Nashville & Davidson County, 129 S. Ct. 846, 852–53 (2009).

253. 129 S. Ct. 1937 (2009).

254. *Id.* at 1942–45.

255. *Id.* at 1944.

256. Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007).

257. Ashcroft v. Iqbal, 129 S. Ct. at 1945.

existence of subject matter jurisdiction[258] and on rejecting—entirely—the existence of supervisory liability of federal officials in *Bivens* suits.[259] The Court also rejected, however, Iqbal's claims against Ashcroft and Mueller under the *Twombly* standard, finding that Iqbal had "not 'nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'"[260]

Unfortunately *Iqbal* did not clarify the meaning of "plausibility" or the content of the *Twombly* standard. While the Court did confirm that *Twombly* applied to all civil cases in federal court,[261] it provided no new guidance to lower courts on *Twombly*'s content. And while the Court clarified that lower courts must sort out factual allegations from legal conclusions before applying the "plausibility" standard,[262] it did not clarify the meaning of "plausibility" itself.[263]

But the Court did affirm and amplify the importance of the three factors relevant to a *Mathews* analysis. Regarding *Mathews* factor (1), in this case the interests of the defendants, the Court made very clear that *Twombly* was motivated by a concern to protect defendants from the "burdens of discovery."[264] *Twombly*'s pleading standards, the Court stated, do "not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[265] The Court recognized that discovery results in the "expenditure of valuable *time* and *resources*."[266]

Regarding factor (2), the "risk of erroneous deprivation" of the defendants' time and resources, the Court made clear that the risk of erroneously unlocking the doors to discovery is central to the *Twombly* analysis.[267] The Court explained *Twombly* as justified by the fact that the complaint in that case "was more *likely* explained by, lawful, unchoreographed free-market behavior."[268] In rejecting the sufficiency

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258. *Id.* at 1945–47.

259. *Id.* at 1947–49. The dissent took the majority to task for its rejection of *Bivens* supervisory liability as being not necessary to the case, not properly briefed, and probably not the correct outcome. *Id.* at 1955–58 (Souter, J., dissenting).

260. *Id.* at 1951 (quoting *Twombly*, 550 U.S. 544, 570 (2007)).

261. *Id.* at 1953.

262. *Id.* at 1949–50.

263. Once again, as in *Twombly*, the majority and the dissent disagreed on the underlying baseline procedure. *Id.* at 1961–62 (Breyer, J., dissenting). Justice Breyer in dissent argued for the alternative procedure of minimal, well-structured discovery. *Id.* (All the dissenters advocated this alternative by arguing for affirmance of the Second Circuit's opinion, which expressly advocated "structure[d] . . . limited discovery." Iqbal v. Hasty, 490 F.3d 143, 158 (2d Cir. 2007)). But the Court expressly rejected this alternative in Subsection IV.C.2 of its opinion. Ashcroft v. Iqbal, 129 S. Ct. at 1953–54 (majority opinion).

264. Ashcroft v. Iqbal, 129 S. Ct. at 1953.

265. *Id.* at 1950.

266. *Id.* at 1953 (emphasis added).

267. *Id.* at 1950.

268. *Id.* (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 567 (2007)) (emphasis

of the factual allegations in Iqbal's complaint, the Court stated "given more *likely* explanations, they do not plausibly establish this purpose."[269] The Court also noted that "the arrests Mueller oversaw were *likely* lawful and justified."[270] Thus the risk of erroneous deprivation by discovery into a meritless claim is identical to the likelihood of other explanations being correct.

The likelihood of alternative explanations also goes to the adversary's interest portion of *Mathews* factor (3), specifically the interest of Iqbal in recovery, as measured by the possibility of recovery discounted by the likelihood that the claim would not entitle Iqbal to relief. Given the Court's conclusion that Iqbal would most likely not be entitled to recovery against Ashcroft and Mueller,[271] it necessarily follows that *Mathews* factor (3) was relatively insignificant.

But *Mathews* factor (3), as adapted to the litigation context, is not solely the adverse litigant's interest, as it also includes "due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections."[272] The Court extensively considered the government's interest in dismissing the complaint,[273] noting that allowing discovery against high-level government officials would burden and distract them from "vigorous performance of their duties."[274]

I. *Context and Flexibility*

Mathews and *Twombly* share another trait: They both set out a flexible, standards-based test for lower courts to use. In both cases, the Court significantly modified prior, inflexible, rule-based precedent: *Mathews* modified *Goldberg v. Kelly*'s hard-and-fast requirement of a pre-deprivation hearing for benefits termination,[275] and *Twombly* repudiated *Conley*'s "no set of facts" language.[276]

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added).

269. *Id.* at 1951 (emphasis added).

270. *Id.* (emphasis added).

271. *Id.*

272. Connecticut v. Doehr, 501 U.S. 1, 11 (1991) (emphasis added). In *Doehr*, the government's interest weighed—albeit very lightly—in favor of not providing the alternative procedure. But this language regarding factor (3) makes clear that the government's interest can either increase *or decrease* the weight of factor (3) in the analysis, as the government may have an interest in "providing . . . or forgoing" the procedure. In *Iqbal*, the government's interest was in "providing" the alternative procedure of dismissal. Ashcroft v. Iqbal, 129 S. Ct. at 1953–54.

273. Ashcroft v. Iqbal, 129 S. Ct. at 1953–54.

274. *Id.* at 1954.

275. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("In only one case, *Goldberg v. Kelly* . . . has the Court held that a hearing closely approximating a judicial trial is necessary.") (internal citations omitted).

276. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 562–63 (2007) (retiring language from *Conley v. Gibson*, 355 U.S. 41, 45 (1957)).

The Court in *Mathews* observed that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,"[277] but is rather "flexible and calls for such procedural protections as the particular situation demands."[278] Both *Mathews* and its progeny have focused on the importance of "context."[279]

Similarly in *Twombly*, the Court emphasized the importance of "context" when evaluating the plausibility of a complaint.[280] The Court explicitly stated that it was describing a standard, referring to "the plausibility standard."[281] The Court contrasted that language with *Conley*, in which it had set forth a "rule."[282] The Court's word choice showed that it recognized that it was describing a standard in place of a rule.

Both *Twombly* and *Mathews*, moreover, mandate a reasonableness inquiry. As noted earlier,[283] the *Mathews* test, as a variant of Judge Hand's three-factor negligence test, requires simply that agencies and courts provide *reasonable* procedural safeguards.[284] Meanwhile, the *Twombly* Court stated that its new plausibility standard merely "calls for enough fact to raise a *reasonable* expectation that discovery will reveal evidence of illegal agreement."[285] In both, reasonableness is determined by balancing the three factors.

V. IMPLICATIONS

This Part considers the potential implications of understanding *Twombly* as an extension of the *Mathews* test to prevent discovery from violating due process. While some of these implications are positive and

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277. *Mathews*, 424 U.S. at 334 (quoting Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961)).

278. *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

279. *Id.* at 344–45 ("The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this *context* than in *Goldberg*.") (first emphasis added); *id.* at 330, 331 n.11, 334, 340, 345 (engaging in additional discussion of context); *see also* Wilkinson v. Austin, 545 U.S. 209, 225 (2005) ("The private interest at stake here, while more than minimal, must be evaluated, nonetheless, within the *context* of the prison system and its attendant curtailment of liberties.") (emphasis added); *id.* at 224, 227 (providing additional references to context).

280. *Twombly*, 550 U.S. at 548–49, 557, 561–62, 565 n.10.

281. *Id.* at 560.

282. *Id.* at 561 (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (noting "the accepted rule")).

283. *See supra* Part III.D.

284. *See* Siebert v. Severino, 256 F.3d 648, 659 (7th Cir. 2001) (citing *Mathews* as a guide for determining whether a procedural requirement is reasonable).

285. *Twombly*, 550 U.S. at 556 (emphasis added); *see also id.* at 559 ("[R]easonably founded hope that the discovery process will reveal relevant evidence.") (internal citations omitted); *id.* at 562 (noting "reasonably founded hope" was necessary).

quite sensible, others are more ambiguous. This Part also concludes that *Twombly* necessarily has constitutional scope, being more than merely an interpretation of the Federal Rules.

A. *Clarity and Institutional Competence*

As noted earlier in this Article, *Twombly* has generated great uncertainty for litigants, the lower courts, and commentators.[286] Courts do not know how to apply *Twombly* or even the meaning of "plausibility."[287]

This Article provides a concrete answer that allows courts evaluating motions to dismiss to draw on the deep well of precedent employing the *Mathews* balancing test. The three *Mathews* factors can be analyzed in the context of discovery as a way to give content to *Twombly*'s vague terms of "plausibility"[288] and "reasonable expectation that discovery will reveal evidence."[289]

Evaluating these three factors is within the institutional competence of the federal district courts. The Court in the recent case of *Ashcroft v. Iqbal* appears to agree, stating that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its *judicial experience* and *common sense*."[290]

Mathews factor (1) as applied to discovery is the property interest in the money spent on discovery, plus the liberty taken away by depositions.[291] District courts supervise discovery,[292] meaning that district and magistrate judges by necessity become experts on the scope and cost of discovery in different types of cases.[293] Indeed, district and magistrate judges themselves have discretion over how much discovery to allow, and their own policies and practices thus contribute to factor (1).

Factor (2) in *Mathews*, the risk of erroneous deprivation, is directly

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286. *See supra* notes 6, 12 and accompanying text.

287. *See* Robbins v. Oklahoma *ex rel.* Dep't of Human Servs., 519 F.3d 1242, 1247 (10th Cir. 2008) ("The most difficult question in interpreting *Twombly* is what the Court means by 'plausibility.'"); Phillips v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008) (discussing the confusion surrounding the "new 'plausibility' paradigm").

288. The *Twombly* majority opinion used the word "plausible" or a close variant eighteen times. *See supra* note 48 and accompanying text.

289. *Twombly*, 550 U.S. at 556; *see also Phillips*, 515 F.3d at 234 (discussing "reasonable expectation").

290. 129 S. Ct. 1937, 1950 (2009) (emphasis added).

291. *See supra* Part IV.A.

292. *See* FED. R. CIV. P. 26.

293. District courts also address the costs of discovery by exercising their discretion to award sanctions under Federal Rule of Civil Procedure 37, further developing their intuition on such matters.

tied to the propensity of the suit to be pursued abusively. As Judge Easterbrook notes, district courts are ill-positioned to detect and remedy discovery abuse before it occurs.[294] But courts, as repeat observers, are in the best position to determine the types of complaints that tend to result in abusive discovery. Most importantly, district courts can evaluate whether the complaint has sufficient factual allegations to give the complaint the "heft" required by *Twombly*.[295] Doubtless courts' "judicial experience"[296] will contribute to this analysis.

Finally, *Mathews* factor (3) in this context is the adverse party's likely interest in proceeding to discovery, as well as the court's own burden in allowing the case to proceed. Needless to say, district courts are ideally positioned to evaluate the burden they themselves will avoid by granting a motion to dismiss. The adverse party's likely interest, like factor (2), is informed by the district or magistrate judge's "judicial experience"[297] of seeing the dispositions of similar cases, particularly the monetary recovery that plaintiffs can expect to receive if the case turns out to have merit. So factor (3), like the other two *Mathews* factors, is very well entrusted to the federal judiciary.

B. *Dismissal Still Tests Legal Sufficiency*

Understanding dismissal as incorporating the *Mathews* balancing test by no means diminishes the traditional role of dismissal as a determination of whether the law allows recompense for the wrong alleged. Motions to dismiss for failure to state a claim are the Federal Rules of Civil Procedure's version of the traditional demurrer,[298] whereby courts test whether the complaint's legal theory is cognizable.[299]

When a complaint fails to state any valid legal theory upon which relief is sought, the plaintiff obviously has no interest at all in proceeding to discovery, corresponding to a value of zero for factor

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294. Easterbrook, *supra* note 172, at 639 ("How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?").

295. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 (2007).

296. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

297. *Id.*

298. For enunciation of this principle, see the advisory committee's note to Fed. R. Civ. P. 12 ("Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action.").

299. Several jurisdictions, such as California, retain the demurrer and its traditional understandings. *See* Sheehan v. San Francisco 49ers, Ltd., 201 P.3d 472, 476–77 (Cal. 2009) (noting that courts "may affirm the sustaining of a demurrer only if the complaint fails to state a cause of action under any possible *legal* theory") (emphasis added).

(3).[300] Moreover, when the complaint does not state any valid legal theory, discovery would be used to find facts despite a *certainty* of failure at summary judgment, corresponding to a value of 100% for factor (2).[301] And factor (1), the cost of discovery to the defendant, will always be nontrivial. Thus, when balancing factors (1) and (2), which are non-trivial and 100%, respectively, against factor (3), which is zero, the *Mathews* test will always mandate dismissing a complaint with no legal sufficiency.[302]

Thus, understanding the new *Twombly* standard for dismissal as the *Mathews* test applied to discovery, does not at all foreclose the traditional role of the motion to dismiss in determining whether the complaint states a valid legal theory. Whenever the complaint fails to state a valid legal theory, the *Mathews* test unambiguously mandates use of dismissal instead of allowing discovery.

C. *No Discovery Plus Summary Judgment*

The prospect of allowing district courts to dismiss a complaint based on grounds other than pure legal insufficiency may trouble some observers, despite evidence that lower courts have long used motions to dismiss for many reasons other than lack of legal sufficiency,[303] and despite the *Twombly* Court's retirement of *Conley*'s "no set of facts" rule. A simple thought experiment, however, shows the unexceptional nature of granting motions to dismiss for reasons other than pure legal insufficiency.

Suppose hypothetically that the district court wherein *Twombly* was originally filed had not dismissed the complaint, but instead had allowed no discovery and then granted summary judgment to the defendants.[304] In all practical terms, the results would be the same: No discovery would occur; the facts presented by the plaintiffs in their

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300. *See supra* note 129. Recall that the alternative procedure is required under the *Mathews* test when the following inequality is true: $P \times V > C$. In this equation, factor (3) is C, which in turn is "the interest of the party seeking [discovery], with, nonetheless, due regard for any ancillary interest the government may have." Connecticut v. Doehr, 501 U.S. 1, 11 (1991). If the complaint fails under any legal theory, then the party has zero interest, and the government's only interest, if any, is to avoid any additional process. Thus, C is either zero or even negative.

301. This is the same analysis as in the previous note, with the additional information that V is 100%.

302. It is clear that the inequality $P \times V > C$ will always be satisfied, as it will be $P \times 100\% > 0$. (The variable P will always be a positive number as discovery always imposes some costs.).

303. *See* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 574–82 (2003); *see also* Matthew A. Josephson, Note, *Some Things are Better Left Said: Pleading Practice After* Bell Atlantic Corp. v. Twombly, 42 GA. L. REV. 867, 878–81 (2008).

304. *See* FED. R. CIV. P. 56.

complaint would be the only basis for keeping the case in court; and these facts would have been viewed in the light most favorable to the plaintiffs, who were the nonmovants.[305]

Had the district court done this, the Second Circuit and Supreme Court would have reviewed the denial of discovery for abuse of discretion,[306] a very deferential standard. But the Federal Rules of Civil Procedure allow discovery limitations, presumably to the point of zero discovery, if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[307] In *Twombly*, the Court found the expense of the proposed discovery to be excessive, particularly given the extremely thin facts alleged in the complaint. As a result, if the district court in *Twombly* had simply allowed no discovery and granted summary judgment, then appellate courts would likely have found that the district court did not abuse its discretion.

This hypothetical example demonstrates how dismissal is effectively just the denial of discovery, followed by summary judgment based solely on the facts alleged in the complaint. Indeed, the courts of appeal often wrestle with how to determine whether a district court's disposition of a case was a dismissal under Federal Rule of Civil Procedure 12(b)(6), or summary judgment under Rule 56.[308] And anecdotally, plaintiffs increasingly attach numerous and lengthy exhibits to complaints, making them resemble more closely oppositions to summary judgment.

The outcome in *Twombly*, in which the Court dismissed the complaint despite the well-established validity of legal liability for

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305. In evaluating either motions to dismiss or motions for summary judgment, courts must take all the facts before them in the light most favorable to the nonmovant. *Compare* Scott v. Harris, 550 U.S. 372, 378 (2007) ("[C]ourts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion.") (internal punctuation omitted), *with* Christopher v. Harbury, 536 U.S. 403, 406 (2002) ("Since we are reviewing a ruling on motion to dismiss, we accept [plaintiff's] factual allegations and take them in the light most favorable to her.").

306. The district court's management of discovery is reviewed for abuse of discretion. *See* Clinton v. Jones, 520 U.S. 681, 706–07 (1997); United States v. Armstrong, 517 U.S. 456, 482 (1996). This results both from the equitable origins of discovery in chancery procedure and from the plain language of the relevant provisions. *See* FED. R. CIV. P. 26(b) (repeatedly stating that the court "may" take certain actions to manage discovery); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 919 (1987) (discussing the chancery origins of discovery).

307. FED. R. CIV. P. 26(b)(2)(C)(iii).

308. *See, e.g.*, Rosenblum v. Travelbyus.com Ltd., 299 F.3d 657, 661–62 (7th Cir. 2002); Finley Lines Joint Protective Bd. Unit 200 v. Norfolk S. Corp., 109 F.3d 993, 996 (4th Cir. 1997).

anticompetitive conspiracies, makes more sense through this view of dismissal as denial of discovery plus summary judgment. This broader scope for dismissal post-*Twombly* also makes it easier to understand *Twombly* as the *Mathews* test applied in order to avoid deprivations worked by discovery. Using dismissal to avoid undue deprivations on parties and the court, as well as to weed out legally-insufficient complaints, is entirely consistent with application of the *Mathews* test.[309]

D. *Subjectivity & Uncertainty*

Understanding *Twombly* as *Mathews* applied to discovery allows federal courts to bring to bear the familiar three-factor *Mathews* analysis, where evaluating the factors is squarely within courts' institutional competency. But it also brings with it the problems of subjectivity and uncertainty that scholars have long noted come with any evaluation of *Mathews* factors in any context.[310] For example, regarding *Mathews* factor (1), judges use different metrics in measuring the magnitude of property or liberty interests, and would split over which of the following property interests is more valuable: a corporation's right to receive $10 million a month in interest or an impoverished widow's right to her monthly $200 pension check.[311]

Just as the *Mathews* factors invite subjectivity, so too does the new *Twombly* pleading standard. For example, regarding factor (1), judges might split on whether to accord different treatment to discovery that would cost $10 million for a multinational corporation, versus discovery that would cost $100,000 for a small business. Moreover, in evaluating factor (3) in an employment discrimination claim, for example, courts might differ on whether to weigh only the plaintiff's likely monetary

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309. Given this understanding of dismissal as the denial of discovery plus summary judgment, the standard of appellate review of dismissals should not change from its current de novo review. *See, e.g.*, Kane Enters. v. MacGregor (USA) Inc., 322 F.3d 371, 374 (5th Cir. 2003) (reviewing a motion to dismiss de novo); Madison v. Graham, 316 F.3d 867, 869 (9th Cir. 2002); McKusick v. City of Melbourne, 96 F.3d 478, 482 (11th Cir. 1996); Bower v. Fed. Express Corp., 96 F.3d 200, 203 (6th Cir. 1996). A district court's application of the *Mathews* test is reviewed de novo on appeal. *See, e.g.*, Dipeppe v. Quarantillo, 337 F.3d 326, 332 (3d Cir. 2003); Willamette Waterfront, Ltd. v. Victoria Station Inc. (*In re* Victoria Station Inc.), 875 F.2d 1380, 1382 (9th Cir. 1989). Of course, any factual determinations made by the district court, such as the expense and cost of discovery required for a particular case, would doubtless be reviewed for clear error. *Cf.* McGuire v. United States, 550 F.3d 903, 908 (9th Cir. 2008) (noting that legal conclusions are reviewed de novo, whereas factual findings are reviewed for clear error).

310. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 39 (1976) (criticizing the *Mathews* Court's approach to evaluating the factors as being "subjective and impressionistic"); *see also* Pierce, *supra* note 129, at 282.

311. This example is partially borrowed from Pierce, *supra* note 129, at 282.

recovery, or to also include the interests of the plaintiff and the government in fighting the injustice of discrimination.

Two recent empirical studies have found that the problem of subjectivity is already arising, albeit for unclear reasons, as district courts post-*Twombly* have increasingly granted motions to dismiss in civil rights and discrimination cases.[312] One study conducted months after *Twombly* was decided found that district courts have not significantly increased the rate of dismissals as a result of *Twombly*—except in civil rights cases, such as those brought under § 1983, for which dismissal rates have seen statistically significant increases.[313] A second, more recent study, focusing on Title VII cases, found that federal district courts have been wielding *Twombly* to dismiss employment discrimination cases at a higher rate than pre-*Twombly*.[314] These trends are troubling.

In effect, many lower courts apparently interpret[315] *Twombly* to have overruled the Supreme Court's cases restating the relative ease with which civil rights or employment discrimination plaintiffs may survive a motion to dismiss: *Swierkiewicz*,[316] which involved employment discrimination; and *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,[317] involving a § 1983 civil rights claim.

But *Twombly*, *Swierkiewicz*,[318] and *Leatherman* are all reconcilable when understood as applying the *Mathews* three-factor test to discovery. In discrimination or civil rights cases, which are often factually straightforward,[319] the deprivation worked on defendants by discovery is relatively small, meaning a small *Mathews* factor (1). Meanwhile, in such cases, factor (2), the likelihood of erroneous deprivation from discovery, is also small. In *Swierkiewicz*, the Court called "the

312. *See infra* notes 313–14 and accompanying text.

313. Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008). This study defined civil rights cases as those brought under 42 U.S.C. §§ 1981, 1982, 1983, 1985, as well as *Bivens* actions and generalized claims of due process or equal protection violations. *Id.* at 1836 n.161. This definition did not include suits under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, or the Americans with Disabilities Act. *Id.*

314. Seiner, *supra* note 12, at 1026–35.

315. *See supra* note 246 (listing examples of courts viewing *Twombly* as overruling, at least in part, *Swierkiewicz*).

316. 534 U.S. 506 (2002).

317. 507 U.S. 163 (1993).

318. This Article has already touched on the reconciliation of *Swierkiewicz* and *Twombly*. *See supra* Part IV.H.2.

319. *See* Seiner, *supra* note 12, at 1021 ("[M]ost employment discrimination claims are relatively straightforward and revolve around battles over intent and causation," and are "at the complete opposite end of the spectrum" from *Twombly*).

provisions for pretrial . . . procedure and summary judgment so effective"[320] in weeding out unmeritorious claims as to establish a reliable baseline procedure. Indeed, empirical data show that summary judgment effectively disposes of many invalid discrimination claims.[321] Finally, factor (3) is substantial, especially given the government's well-established and strong interest in stamping out discrimination and civil rights abuses.

That *Twombly* simply extended the three-factor *Mathews* test to discovery explains some of the subjective evaluations introduced into certain types of dismissals, including employment discrimination. But this insight can also provide courts with a familiar framework for analyzing motions to dismiss, giving content to the "plausibility" standard and thus aiding the process of reestablishing uniform pleading standards throughout the federal court system.[322]

E. *International Perspective*

While the Supreme Court's jurisprudence has increasingly extended the *Mathews* test to all areas of procedure,[323] the Court has also increasingly cited foreign law and precedent for support, often in cases where U.S. law diverges from other countries' laws.[324] This trend has certainly had its fair share of detractors,[325] yet it may help to explain why the *Twombly* opinion garnered the unqualified votes of several Justices not otherwise known for favoring defendants in civil actions.

The U.S. system of discovery is unique in scope and in the tools it makes available to attorneys.[326] Even other common law countries

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320. 534 U.S. at 512–13; *accord Leatherman*, 507 U.S. at 168–69 ("[F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.").

321. *See* Seiner, *supra* note 12, at 1032–35.

322. As discussed earlier, the recent *Iqbal* case contributed little or nothing to understanding the meaning of "plausibility." *See* discussion *supra* Part IV.H.3. But the Court unwittingly highlighted the problems of subjectivity in the plausibility standard, stating that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its *judicial experience and common sense*." *Iqbal*, 129 S. Ct. 1937, 1950 (2009) (emphasis added). Experience and common sense inherently invite a subjective analysis.

323. *See supra* Part III.B.

324. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575–78 (2005).

325. *See, e.g.*, *id.* at 627–28 (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting); Steven G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1337–38 (2006).

326. *See* Edward F. Sherman, *Transnational Perspectives Regarding the Federal Rules of Civil Procedure*, 56 J. LEGAL EDUC. 510, 517–18 (2006); Stephen N. Subrin, *Discovery In Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 300 (2002); *see also* Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 549 (1987) (Blackmun, J., concurring and dissenting). *See generally* Hague Convention on the

abhor American-style discovery, with its intrusive depositions and massive production requests.[327] Despite a much narrower starting point for discovery, the courts of the United Kingdom have moved even further away from the American model in the past decade.[328] In this context, *Twombly* may be viewed partly as the Court recognizing what other nations have long understood: Discovery can easily turn into an intrusive deprivation of money and individuals' time. Accordingly, such interests would deserve protection under notions of procedural due process, which the Supreme Court effectuates through the *Mathews* test.

F. *Constitutional or Statutory?*

Mathews is, of course, a constitutional decision about the minimum requirements imposed by the Due Process Clauses of the Fifth and Fourteenth Amendments.[329] If this Article's hypothesis is correct, and *Twombly* is best understood as *Mathews* applied to discovery, then *Twombly* itself has constitutional scope, with ramifications well beyond just the Federal Rules of Civil Procedure.

One can argue, of course, that *Twombly* is to be read solely as a construction of the Federal Rules of Civil Procedure. The Supreme Court is the final interpretative arbiter of both the Due Process Clauses and of the Federal Rules of Civil Procedure. Rule 1 of the Federal Rules of Civil Procedure states in pertinent part that the Rules "should be construed and administered to secure the *just*, *speedy*, and *inexpensive* determination of every action and proceeding."[330] The same notions lie behind both procedural due process and "just, speedy, and inexpensive" resolution of proceedings. *Twombly* could be read as simply deploying the *Mathews* factors to further these statutorily-mandated goals.

But a violation of *Mathews* violates the Constitution, and subsequent cases will likely reveal *Twombly* to be the Court's initial step toward applying *Mathew*'s procedural safeguards to discovery. The Court has a long-standing preference for resolving cases through statutory interpretation whenever possible, rather than resorting to constitutional law.[331] In *Twombly*, the Court may indeed have focused on the Federal

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Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (facilitating the exchange of letters of request between nations).

327. *See* Sherman, *supra* note 326, at 517; Subrin, *supra* note 326, at 304, 306–07; Hooker Corp. v. Australia (1985) 80 F.L.R. 94, 104 (Austl.); *see also* Lord Advocate, Petitioner, 1998 S.L.T. 835, 839 (Oct. 10, 1997) ("In the United States the courts permitted wide ranging pre-trial discovery but this procedure was not allowed in the United Kingdom. The courts in England and Scotland . . . would not countenance 'fishing' expeditions.").

328. Subrin, *supra* note 326, at 304–05.

329. U.S. CONST. amends. V, XIV, § 1.

330. FED. R. CIV. P. 1 (emphasis added).

331. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also* Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 343–

Rules in order to avoid expressly determining the point at which discovery abuse becomes a procedural due process violation.[332] Such judicial restraint is sensible and entirely consistent with the Roberts Court's incrementalist approach to judging.

Future cases should squarely present the Court with the underlying constitutional question. The most likely type of case to do so would be a case granted certiorari from a state court system with a divergent standard for motions to dismiss.[333] After all, the same minimum requirements of procedural due process that apply in the federal courts also apply in state courts.[334] Other possible routes do exist, such as a case from a federal circuit court that adopts a reading of *Twombly* that insufficiently protects procedural due process. Or the Court could accept a garden-variety pleading case and simply state outright that *Twombly* was motivated by due process concerns.

G. *Equity Practice in the Framers' Era*

Arguing that *Twombly* applies notions of procedural due process to pleading standards invites an inquiry into whether *Twombly* conflicts with (or is supported by) the original intention[335] of the Framers of the Fifth Amendment, which supplies the guarantee of due process relevant to the federal courts.[336] In a closely-related vein, one must also ask whether this understanding of *Twombly* conflicts with the Seventh Amendment's guarantee of trial by jury "[i]n Suits at common law."[337]

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44 (1999); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

332. The *Twombly* court noticeably did not expressly ground its new plausibility standard in the text of the rules or any other statute. The rules do not even mention "plausibility" or any variant. Indeed, time may reveal the new "plausibility" standard as being of constitutional scope.

333. *Cf.* Chen, *supra* note 7, at 1432 (discussing whether state courts should follow the lead of *Twombly*).

334. *See* Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 85–86 (1988); Hodge v. Muscatine County, 196 U.S. 276, 281–82 (1905).

335. This Article certainly does not argue that original intent is the only guide to understanding "due process," let alone that it is the primary basis or justification for *Twombly*. Rather, this Part responds to potential original intent objections. Inasmuch as one believes that constitutional interpretation should be informed by other influences including evolving wisdom, experience, economic analysis, and foreign law, those also provide a solid foundation for *Twombly*. *See, e.g.*, *supra* Part V.E.

336. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without *due process* of law") (emphasis added). Of course, the Fourteenth Amendment contains an identical guarantee of due process applicable to state courts. Equity practice and discovery changed little between the Fifth and Fourteenth Amendments, so this same analysis would apply to state courts. The only notable change was the Field Code's introduction of some very limited discovery procedures at law. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 696 (1998); Subrin, *supra* note 306, at 937.

337. U.S. CONST. amend. VII ("In suits at common law, where the value in controversy

To address these questions, one must look at equity practice in the time of the Framers, because at that time only equity provided for discovery.

1. Relation to the Seventh Amendment

In England at the end of the eighteenth century, equity and the common law were entirely distinct bodies of law vested in different courts: the common law was administered in the various common law courts, and equity was administered in the chancery.[338] This same distinction remained in the federal courts established in the United States by the Judiciary Act of 1789,[339] with equity remaining a distinct practice from law in the federal courts until the merger of law and equity in 1938 with the adoption of the Federal Rules of Civil Procedure.[340] Indeed, from the inception of the federal courts, the equity practice of federal courts was adopted wholesale from English chancery practice.[341]

As Blackstone makes clear, the common law courts were unable to provide discovery, which was available only through equity procedures.[342] Indeed, the very idea of a subpoena originated in equity.[343] Discovery was available in equity both to support a suit filed in equity and as a supplement to any action at common law.[344] So, a litigant in the common law courts could go over to the chancery and request discovery in equity, and then use the evidence thus discovered in the common law courts.[345] But the common law itself lacked

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shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). The Seventh Amendment does not apply to the states.

338. *See generally* 3 WILLIAM BLACKSTONE, COMMENTARIES 30–60 (Oxford, Clarendon Press 1768) (explaining the different public courts of common law and equity).

339. Ch. 20, 1 Stat. 73; *see also* Process Act of September 29, 1789, ch. 21, 1 Stat. 93, 93–94. The statutes passed by the first Congress are generally considered to be a good guide to the Framers' intent both because of the close chronology and because many of the Framers were members of the first Congress.

340. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 602–03 (5th ed. 2003).

341. Guaranty Trust Co. v. York, 326 U.S. 99, 105 (1945); FALLON, *supra* note 340, at 602–03. Note that "[s]tates in the early days [of the new republic] varied greatly in the manner in which equitable relief was afforded and in the extent to which it was available." *Guaranty Trust*, 326 U.S. at 104.

342. *See* BLACKSTONE, *supra* note 338, at 51 (noting that the common law writs "might have effectually answered all the purposes of a court of equity; except that of obtaining a discovery"); *see also* JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA §§ 1484–85, at 812–13 (Melville M. Bigelow ed., Little, Brown & Co. 13th ed. 1886) (1835).

343. BLACKSTONE, *supra* note 338, at 52 (discussing the origin of the writ of subpoena).

344. *See* BLACKSTONE, *supra* note 338, at 437; STORY, *supra* note 342, § 1483, at 811–12.

345. BLACKSTONE, *supra* note 338, at 437.

discovery mechanisms of any kind.[346] And this distinction continued in the United States for many decades after the founding. In 1835 to 1836, Justice Story's *Commentaries On Equity Jurisprudence, as Administered in England and America*, referred to equity as having the "exclusive"[347] ability to provide discovery, and thus, "[i]n a general sense Courts of Equity may be said to be assistant to other courts in a variety of cases."[348]

In this context, the irrelevance to discovery of the Seventh Amendment's guarantee of jury trials in "[s]uits at common law" becomes clear.[349] The Seventh Amendment preserves the right of litigants to have factual issues tried to juries—the same "right which existed under the English common law when the [a]mendment was adopted."[350] But the amendment does not guarantee a right to discovery into factual issues, as the common law undoubtedly did not even provide discovery mechanisms.[351] In short, the Seventh Amendment guarantees a certain method for resolving factual disputes at trial (i.e., by jury), but cannot reasonably be interpreted to guarantee discovery into facts before trial. Now, after *Twombly*, as in the common law courts of the late eighteenth century, a plaintiff must come into court with at least the rudimentary facts supporting the claim and cannot rely on the power of the court to fish for facts to make a case.[352]

2. Modern Discovery Vastly Exceeds Founding-Era Equity

Although modern discovery practice is rooted in equity practice, under the Federal Rules of Civil Procedure, it goes well beyond anything recognizable in equity practice at the time of the founding. Indeed, the discovery provisions under the Rules go well beyond anything known before the Rules' adoption in 1938. As Charles Clark, the "father"[353] of the Rules stated of the discovery system found in the

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346. BLACKSTONE, *supra* note 338, at 437–38.

347. STORY, *supra* note 342, § 1480, at 810. Justice Story referred to the discovery function of equity as "the auxiliary or assistant jurisdiction which indeed is *exclusive* in its own nature, but being applied in aid of the remedial justice of other courts may well admit of a distinct consideration." *Id.* (emphasis added).

348. STORY, *supra* note 342, § 1481, at 810.

349. U.S. CONST. amend. VII.

350. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

351. The Framers knew how to refer to equity—which was then separate from the law—when they wanted to. *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity."); U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity.").

352. The common law around the time of the founding hardly allowed every dispute to get to a jury, as plaintiffs had to pass the gauntlet of the writ system. *See generally* WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW (7th ed. 1956) (discussing common law around the time of the founding and what was required to get before a jury).

353. Clark was the Reporter for the Advisory Committee on Rules for Civil Procedure,

Rules:

> It goes very much beyond English procedure, which does not provide for general depositions of parties or witnesses. And only sporadically was there to be found here and there a suggestion for some part of the proposed system, but nowhere the fusion of the whole to make a complete system such as we ultimately presented.[354]

Furthermore, Edson Sunderland, who drafted the Rules' discovery provisions, acknowledged that there was no precedent for the liberalized discovery he contemplated.[355]

For example, the Rules vastly liberalized the use of oral depositions, which had been available under prior equity practice only in the most exceptional of circumstances.[356] Even when these exceptional circumstances occurred, "any discovery that resulted was only accidental and incidental."[357] The expansion of discovery under the Rules included not only the availability of new mechanisms, but also expanded scope and breadth of the factual matters that discovery could explore,[358] all with a reduction in judicial supervision.[359]

It is now well-settled law that the *Mathews* test determines procedural due process whenever the Constitution does not already provide an answer. As noted earlier, even Justice Scalia, a leading originalist thinker, accepts this role for the *Mathews* test.[360] Because modern discovery barely resembles any procedures existing before the twentieth century—let alone in the time of the Framers—applying the *Mathews* test to avoid discovery's deprivations is entirely consistent with the originalist approach.

This is not to suggest that procedural due process requires strict pleading rules as a method for containing discovery.[361] Hardly so.

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which drafted the Rules. He was also a Professor and Dean at Yale Law School, and later a Judge on the Second Circuit Court of Appeals.

354. Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 11 (1959).

355. Subrin, *supra* note 326, at 719 (citing Proceedings of the Advisory Committee on Uniform Rules of Civil Procedure for the District Court of the United States (Nov. 17, 1935) *in Records of the U.S. Judicial Conference on Rules of Practice and Procedure*s, at CI-113-92).

356. STORY, *supra* note 342, §§ 1505–12, at 830–34 (discussing bills to perpetuate testimony, available only when there was a danger of the testimony being lost); *id.* §§ 1513–15, at 834–38 (testimony *de bene esse* and of persons abroad); Subrin, *supra* note 326, at 953; Subrin, *supra* note 326, at 699 (noting that the earlier Federal Rules of Equity provided for oral depositions only in "exceptional" circumstances). Professor Subrin noted that early equity practice was only an "embryonic discovery system." Subrin, *supra* note 326, at 740.

357. 8 WRIGHT & MILLER, *supra* note 164, § 2002.

358. Subrin, *supra* note 326, at 719.

359. Subrin, *supra* note 326, at 720–21.

360. *See supra* notes 100–01 and accompanying text.

361. Indeed, Sunderland, the drafter of the Rules' discovery provisions, suggested a

Rather, because modern discovery procedures go so far beyond anything known to courts in the Framers' era, pleading standards must conform to the flexible, context-based, modern notions of procedural due process embodied in the *Mathews* test.

3. *Twombly*'s Standard Echoes Equity Practice of Framers' Era

To the extent that modern expansive discovery can trace its ancestry to late eighteenth century equity practice, that practice reasonably foreshadowed *Twombly*'s plausibility standard. Justice Story, in describing the availability of discovery in equity practice, repeatedly referred to a party's need to state the basic operative facts to obtain discovery.

For example, regarding discovery into property issues, Justice Story stated that "if a plaintiff comes into equity . . . he must obtain it upon the *strength of his own case* and his *own evidence*; and he is not entitled to extract from the conscience of the innocent defendant any proofs to support it."[362] Equity practice at that time did not allow parties to engage in the tangential discovery that has today become commonplace, as parties were "not at liberty to pry into the title of the adverse party."[363]

Blackstone confirms this understanding that equity required "setting forth the circumstances of the case at length" before subpoenas would issue.[364] Indeed, had a founding-era plaintiff requested the discovery William Twombly did, on such bare facts, "his bill would most aptly be denominated a mere fishing bill."[365] Discovery practice in the Framers' era thus presents no problems for applying *Mathews* to discovery, and even provides support.

VI. CONCLUSION

This Article has argued that *Bell Atlantic Corp. v. Twombly*, rather than being a revolutionary change in pleading standards, is simply part of the Supreme Court's continual expansion of the *Mathews v. Eldridge* three-factor balancing test.[366] Indeed, the *Twombly* majority's opinion addressed the three *Mathews* factors in their traditional order. And the majority discussed factors, such as the cost and individual inconveniences resulting from discovery, and the risks of erroneous deprivation, which would otherwise appear irrelevant to pleading standards.

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limitation along these lines, but it was rejected. *See* Subrin, *supra* note 326, at 722.

362. STORY, *supra* note 342, § 1503, at 827 (emphasis added).

363. STORY, *supra* note 342, § 1490, at 815–16.

364. BLACKSTONE, *supra* note 338, at 442.

365. STORY, *supra* note 342, § 1497, at 822.

366. *See supra* Part III.B (discussing the Court's continual expansion of *Mathews*).

There is no reason to think that the *Mathews* test would not or should not apply to discovery. As the *Twombly* majority made clear, discovery can easily deprive litigants of well-established property interests and liberty interests. And discovery relies upon the coercive power of the state for compliance, thereby requiring the protections of procedural due process. In *Connecticut v. Doehr* the Court unanimously struck down a prejudgment attachment statute as failing the *Mathews* test and thus violating procedural due process.[367] Discovery is similar in all relevant respects to the attachment challenged in *Doehr*,[368] potentially working deprivation of private interests and using the power of the state for the benefit of an adverse litigant. The alternative safeguard considered by the *Twombly* court, dismissing an implausible complaint, decreases the likelihood of erroneous deprivation and thus maintains procedural due process.

Understanding *Twombly* as *Mathews* applied to discovery allows courts to draw on the well-developed framework and case law supporting the three-factor *Mathews* test. Applying the three *Mathews* factors to discovery deprivations is, moreover, well within the institutional competence of the federal judiciary. Using this recognized framework allows courts to avoid some of the questionable interpretations of *Twombly*, such as those that have led to a spike in dismissals of employment discrimination claims.[369] An understanding of *Twombly* as *Mathews* applied to discovery not only makes *Twombly* appear less radical, but also ultimately promotes the just and efficient resolution of litigation.

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367. Connecticut v. Doehr, 501 U.S. 1, 11, 18 (1991).

368. In *Doehr*, the relevant deprivations were merely clouded title, impaired alienability, tainted credit, reduced chance of getting a home equity loan, and technical mortgage default. *Id.* at 11. By contrast, discovery can cost excessive amounts of money, which is a well-recognized property interest, and "taking employees of a corporation out of work and holding them *captive* in lawyers' offices during depositions," which violates liberty. Easterbrook, *supra* note 172, at 645 (emphasis added). And "the Court has never held that only such extreme deprivations trigger due process concern." *Doehr*, 501 U.S. at 12.

369. *See supra* Part V.D.